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FILED

JUL 2 1998

No. 97-1950

In The

Supreme Court of The United States

October Term 1997

JIM POPE, as Sheriff, et al.

Petitioners,

v.

ROLLAND RICHARD HENRY

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

To justify why this Court should grant certiorari, petitioners contend that the United States Court of Appeals held that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983 in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them. (Petition For Writ Of Certiorari at page stating "Question Presented") Petitioners contend that said holding conflicts with a decision of this Court, Bd. Of County Commissioners v. Jill Brown, 520 U.S. 397 (1997). Therefore, petitioners contend the decision of the Court of Appeals must be reversed.

Petitioners are mistaken. The Court of Appeals did not issue a new rule of law. Nor did it issue a "doctrine" (Petition For Writ Of Certiorari at page 5, referring to the supposed rule as "the post-event doctrine"). The Court of Appeals did not hold that post-event evidence standing alone is sufficient to prove a claim under section 1983. Nor did the Court of Appeals "expand" the law. The Court Of Appeals applied the law. It followed the law. Accordingly, petitioners' premise is wrong. Their reasons for granting certiorari are without foundation.

Assuming for the sake of argument that the Court of Appeals *did* state a new rule on post-event evidence, it did so in the context of a motion for *summary judgement* to determine whether there exist triable issues of material fact to justify sending the case to a jury. And even if it did state a

new rule, it did not apply that rule in a vacuum or consider post-event evidence to the exclusion of other evidence. It looked at *all* the evidence -- before the event, during the event, and after the event, including post-event evidence that petitioners ignored and failed to mention in their Petition For Writ Of Certiorari [1] -- and found triable issues of material fact under the principles of municipal liability set down by this Court in Monell v. Department of Soc. Servs., 436 U.S. 658, 694 (1978). The Court of Appeals' holding was not inconsistent with, but was perfectly in line with, traditional rules of liability under section 1983.

In Jill Brown this Court did not set a new or higher standard of municipal liability under section 1983. It adhered directly, and repeatedly cited to, the principles established in Monell. It reaffirmed the very case -- Monell -- on which the Court of Appeals in the instant case based its decision. In Jill Brown the issue was ". . . whether, under Monell and subsequent cases, a *single* hiring decision by a county sheriff can be a 'policy' that triggers municipal liability." 117 S. Ct. at 1388. (emphasis added) Jill Brown was an "inadequate screening case." 117 S. Ct. at 1391. It looked at *pre-event evidence* -- the decision to hire the reserve deputy in that case -- and decided on the facts before it that such an event -- which this Court characterized as a "single hiring decision" -- without more, did not prove the municipality's deliberate

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[1] Petitioners ignore and have failed to mention in their Petition For Writ Of Certiorari *all* of the post-event evidence that the Court of Appeals considered, as explained more fully below.

indifference to plaintiff Jill Brown's constitutional rights.[2] The import of Jill Brown was to make sure that it was clearly understood that the bar for municipal liability under section 1983 had not been lowered; that it was not now easier to establish the basis for municipal liability on the basis of a *single hiring decision*.

The foregoing point is important because the Court of Appeals in the instant case held scrupulously to the rules set down in Monell and at every turn in a *series of events* involving pre-event evidence, event evidence, and post-event evidence examined whether in this case under the *summary judgment* standard there was a triable issue of material fact respecting the issue of *deliberate indifference* and whether " . . the unlawful actions of its employees or agents were taken

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[2]This Court said, "A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" 117 S. Ct. at 1392. In the following paragraph the Court elaborated on the point: ". . .a finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." 117 S. Ct. at 1392.

pursuant to that defendant's policies or customs. . ." (Opinion of the Court of Appeals set forth in Petition For Writ Of Certiorari, Apdx B, page B -17 [hereinafter, Apdx. B -__])[3] (emphasis added). All throughout the opinion the Court of Appeals looked at the very issues which this Court stressed in its decision in Jill Brown. Looking particularly at what happened to Mr. Henry on the night of his detention at the county jail, and *not* at other incidents afterward, the Court of Appeals found, ". . .a widespread pattern of abuse by numerous individuals rather than a single instance of mistreatment of a solitary officer." (Apdx. B - 27)

A sharp procedural difference demarcates this case from Jill Brown. Jill Brown reached this Court on a full record after a *trial by jury*. The instant petition reached the Court of Appeals following a decision by the U.S. District Court granting *summary judgment* for petitioners as defendants. The difference is that on appellate review the Court of Appeals examines the record de novo in the light most favorable to the nonmoving party, who in this case is Mr. Henry. In doing so the Court of Appeals found for Mr. Henry and reversed.

Facts Of The Case

The facts of the case are summarized in detail in the opinion of the Court of Appeals (Apdx. B - 6-15) Plaintiff Rolland Henry, a motorist, was stopped by the California Highway Patrol for a tail light violation on May 13, 1993. The

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[3]Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997)

officer issued Mr. Henry a ticket for the tail light violation and for failure to wear his seat belt. Mr. Henry declined to sign the ticket. Instead, Mr. Henry asked to be taken to a magistrate. Mr. Henry cited to the officer a provision in the California Vehicle Code[4] that, according to Mr. Henry, entitled him to be taken to a magistrate regardless of the time of day.[5] Mr. Henry was told to sign the ticket or go to jail. Mr. Henry continued to insist on a third option, that he be taken to a magistrate. Eventually, with a CHP Sergeant present, Mr. Henry was handcuffed and taken to the Shasta County Jail.

At the jail, Mr. Henry continually asked to be taken to a magistrate even when told by Sheriff's deputies, including a Sheriff's Sergeant, that he could be released on his own recognizance if he signed a promise to appear or posted $76.00 bail. After Mr. Henry continued to ask to be taken to a magistrate, he was booked into the jail. He was asked some medical questions by a Sheriff's deputy and a nurse, which he answered, but then asserted his right to remain silent until he was taken to a magistrate. The two would not tell Mr. Henry their names and he could not read their name tags because he did not have his glasses with him. A jail nurse then informed Mr. Henry his clothes would be removed and he would be placed in a rubber room unless he answered her questions. The nurse then ordered that Mr. Henry be taken to a hospital.

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[4]California Vehicle Code section 40302.

[5]California Penal Code section 810.

Mr. Henry's wife and the nurse talked on the phone. Their accounts differ as to what was said. The transport to the hospital and the visit itself occurred without incident.

After his return to the jail, Mr. Henry again refused to answer a nurse's questions. The nurse informed Sheriff's deputies she "wasn't going to fool with [him]." Mr. Henry was then placed in a rubber room with a plastic mattress but without sink or toilet. The floor was sticky and smelled of urine. Sheriff's deputies removed his clothes. He was thrown a blanket and placed on "suicide watch." Sheriff's deputies then removed Mr. Henry from the rubber room without his clothes. He was escorted naked to a booking cage in full view of male and female Sheriff's deputies. At the booking cage he was photographed. He continued to ask to be taken to a magistrate and refused to answer questions or sign anything until the condition was met. He was then returned to the same rubber room with the sticky floor and urine odor for the rest of the night.

The following morning, a deputy came to the room and Mr. Henry asked for a form habeas corpus petition, writing utensil, and a magnifying glass so that he could read the form. The Sheriff's deputy laughed, said "Yeah, right," and told Mr. Henry he had no rights as long he was in that room. Mr. Henry overheard the Sheriff's deputy repeat to other deputies his request for a habeas corpus petition and heard the other deputies laugh as well.

A different Sheriff's deputy came to the rubber room and informed Mr. Henry he was being kept in the room because he refused to answer questions and sign forms. The

Sheriff's deputy informed Mr. Henry he would be held in the rubber room naked indefinitely without being taken to a magistrate until he agreed to sign the paper. Mr. Henry, fearing for his health and safety, agreed "under threat" to the Sheriff's deputy's request. Still at this point Mr. Henry did not have his glasses. The deputy steered Mr. Henry's hand to the line on the form to sign. Mr. Henry signed the paper without knowing what it said. It was never read to him. He was told he would be returned to this room if he further refused to sign papers or answer questions.

At this point Mr. Henry was permitted to shower, get dressed and was moved to a clean jail cell. Later Mr. Henry was put through the booking process again and was reminded what would happen if he did not cooperate. A different Sheriff's deputy then told Mr. Henry that if he "pissed off" the judge and came back to the jail for any other reason than to be released he would be stripped naked and given a body cavity search. At 1:30 pm he was taken to a magistrate where he was arraigned. At his trial the charges against him were dismissed.

I. The Court Of Appeals Did Not Hold That Post-Event Evidence By Itself Is Sufficient To Prove A Claim Under 42 U.S.C. Section 1983

To create an issue where there is none, petitioners argue that the Court of Appeals articulated a new rule of law and rested its decision solely on that rule. Petitioners further contend that this so-called new rule conflicts with the law of this Court and with the law in other Circuits. Accordingly, they reason that certiorari must be granted to correct the

decision of the Court of Appeals. The new rule they say the Court of Appeals stated is that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983, in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them (Petition For Writ Of Certiorari at page stating "Question Presented").

Petitioners are incorrect. The Court of Appeals' decision in the instant case did not articulate a new rule of law. It did not hold that post-event evidence is sufficient, in the absence of other evidence, to prove an official policy or custom in violation of 42 U.S.C. Section 1983. The Court of Appeals did not look solely at post-event evidence. The Court said, "Those declarations [post-event] are by no means the only evidence Henry has offered to support his Monell claim, however." (Apdx. B - 25) The Court of Appeals looked at evidence from three time frames revolving around the facts of this case: *before* Mr. Henry's arrest, *during* his incarceration at the Shasta County Jail, and *after* his release from custody.

A. Events *Prior* To Mr. Henry's Arrest

The Court of Appeals' decision made specific reference to an incident that occurred prior to Mr. Henry's arrest in the instant case. The Court stated, "Finally, there is evidence in the record that Henry himself was placed in a rubber room at the jail in 1986 under substantially similar circumstances. The Prison Health Services record on Henry's detention in the "safety cell" in 1993 includes the following

notations [6]... Thus, there is evidence that a county policy of abusing persons stopped for minor infractions who refused to sign a ticket or demand to see a magistrate by throwing them naked into a "safety cell" *had been in existence since at least 1986.*" (Apdx. B - 28) (emphasis added) A page later, the Court stated, "That Henry himself encountered similar treatment some seven years before not only adds weight to his claims but also evidences that the policy was a longstanding one." (Apdx. B - 28)

B. Events Occurring *During* Mr. Henry's Incarceration

The Court of Appeal also relied on the events that occurred to Mr. Henry during his incarceration. Those facts are set forth *in detail* in the Court of Appeals' opinion (Apdx. B - 6-15) and are summarized in the instant Brief above. The Court of Appeals concluded, "The continuing threats Henry received from various sheriff's deputies, both before and after he complied with their demands, provide substantial evidence that the jail personnel were acting in accordance with a county policy encouraging or at least condoning flagrantly

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[6]"[Henry] was placed in [a medical "safety cell"] to [rule out] suicidal ideation & to observe. He appeared to sleep all night. Refused breakfast. Inmate did this in 1986 also. He was arrested because he refused to sign a "fix-it" ticket for a taillight as it "violates my constitutional rights." He was brought to jail. 1986 he did the same thing. Refused to answer med. questions." (Apdx. B - 28)

unconstitutional treatment of persons stopped for non-jailable offenses who refuse to sign notices to appear or demand to be taken before a magistrate. In short, the evidence of the officials' conduct strongly suggests that Henry's treatment resulted from *a widespread pattern of abuse* by numerous individuals *rather than a single instance of mistreatment by a solitary officer*." (Apdx. B - 26-27)[7] (emphasis added)

Petitioners contend that the County of Shasta and Sheriff Jim Pope are not liable under section 1983 merely because they employ tortfeasors (Petition For Writ Of Certiorari at page 4). Petitioners also contend that plaintiff in the instant case failed to submit at least some evidence

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[7]The Court of Appeals pointed out that: "(1)a sheriff's deputy not only refused to provide him with the materials he requested in order to prepare a habeas petition – materials to which he had a right under clearly established federal law [citations omitted] – but also repeated the request to various other jail personnel, who merely laughed and did not take any steps to comply with the request; (2) even after Henry ultimately told a second deputy that he would cooperate, and signed the statement placed before him (which he made clear he could not see to read and which was not read to him), that deputy twice threatened that if he did not continue to cooperate he would be put back in the "safety cell;" and (3) a third deputy later warned Henry "that if [he] "pissed off" the judge and came back down to the jail for any other reason than to be released, that [he] would be stripped naked, receive a body cavity search and be placed back in the solitary confinement cell." (Apdx. B - 25-26) The Court of Appeals further noted that "A body cavity search of Henry under those circumstances not only would have been unconstitutional, but also would have violated subsections (f) and (h) of Cal. Penal Code Section 4030." Footnote 14 of Opinion.

demonstrating deliberate indifference on the part of Sheriff Jim Pope and the County of Shasta concerning his detention. (Petition For Writ Of Certiorari at pp. 6-7) The Court of Appeals addressed this issue. It stated, "In view of all of the facts and circumstances of Henry's confinement, there is adequate evidence to suggest that the violations of his constitutional rights were not the result of a few officers acting on a lark or in violation of the orders or policies that governed their conduct. The fact that so many officials participated in the manner they did in the unconstitutional abuse of Henry throughout the period of his detention is thus further substantial evidence in support of his Monell claim. See e.g. Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) (conduct of ten officers, three of whom fired shots, during attempted apprehension of suspect was sufficient to support verdict against city on Monell claim)." (Apdx. B - 27)

C. Events Occurring *After* Mr. Henry's Release From Custody

Finally, the Court of Appeals based its decision on post-event evidence. Petitioners contend the Court of Appeals looked solely to post-event incidents involving Mr. Burns and Mr. May. They ignore and fail to mention other post-event evidence which the Court of Appeals also considered: that deputies and medical staff who mistreated plaintiff Henry were still employed in the jail when the County of Shasta and Sheriff Jim Pope filed their motion for summary judgment.

This latter point – that the Court of Appeals took into consideration that the perpetrators were still employed at the jail a year later – is significant here because it obviously factored into the Court of Appeals' decision and because it was probative of defendants' deliberate indifference to the constitutional rights of Mr. Henry.

1. Incidents Involving Mr. Burns And Mr. May

The Court of Appeals looked at two incidents which occurred after Mr. Henry's release from jail. The Court stated, "May and Burns each described being subjected to treatment at the Shasta County Jail virtually identical to Henry's after they were stopped for what were at worst only minor traffic infractions." (Apdx. B -18-19) The Court of Appeals then examined each declaration. (Apdx. B - 19-22)

The Court of Appeals noted that the incident involving Mr. Burns occurred ". . . two to three months after Henry filed the instant section 1983 action. . . It is a reasonable inference – indeed, the only reasonable inference – that after Henry filed suit and successfully served process against the county, it knew about the alleged malfeasance of its employees at the jail." (Apdx. B - 19-20) The Court of Appeals went on to note that:

> "...surely its failure even after being sued to correct a blatantly unconstitutional course of treatment – stripping persons who have committed minor traffic infractions, throwing

them naked into a "rubber room" and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate – is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct." (Apdx. B - 25)

The Court noted that:

"May's detention occurred only two and one-half months after Henry's. Such close proximity in time of the two events lends further support to Henry's claim that his treatment was not an isolated event but was instead inflicted in accordance with county policy." (Apdx. B - 21-22)

2. Jail Personnel Were Still Employed In The Jail Over A Year After The Suit Was Filed

The Court of Appeals was struck by an additional consideration which petitioners ignore and make no mention of in their Petition For Writ Of Certiorari: deputies and medical staff who mistreated plaintiff Henry were still employed in the jail when the County of Shasta and Sheriff Jim Pope filed their motion for summary judgment. The Court of Appeals stated, "We note also that, although there is no record at this stage of the proceedings as to whether

disciplinary proceedings were ever held, it does appear from the declarations submitted by the defendants that at least some and perhaps all of the individuals responsible for violating Henry's rights are still employed in their former capacities at the Shasta County Jail." (Footnote 13, Apdx. B - 25) In other words, the people who violated the Constitutional rights of Messrs. Henry, Burns and May were still employed in the jail over a year later -- when the motion for summary judgment was filed – and remained in a position to violate the rights of future minor traffic offenders who might be brought to the jail for refusing to sign a traffic ticket.[8]

II. Summary Judgment For Petitioners Was Properly Reversed

It is important to keep in mind that the instant case is before this Court on the trial court's summary judgment for petitioner-defendants as moving parties. The Court of Appeals reviewed the judgment de novo[9] and reversed. This is a procedural wrinkle that petitioners fail to account for in

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[8]That the same personnel were still working in the jail a year later takes on added significance in light of Judge Rymer's observation, at the very outset of her dissent, that "The issue in this is not whether Henry's treatment at the Shasta County Jail was awful: it was awful." (Judge Rymer's dissent, Apdx. B - 33)

[9]The Court of Appeals reviews a trial court order granting summary judgment de novo. E.g. Nacimiento Realty Co. v. San Luis Obispo, 841 F.2d 872 (9th Cir. 1987); Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990).

their legal analysis. When reviewing a U.S. District Court's decision de novo, the Court of Appeals reviews the evidence and all factual inferences in the light most favorable to the nonmoving party in determining whether a genuine issue of material fact exists, and whether the moving party is entitled to judgment as a matter of law. (Moore's Federal Practice, Section 56.41[3] [a], p. 56-299 (3d ed. 1998)) [hereinafter cited as Moore]

This Court's 1986 trilogy of summary judgment cases[10] requires the nonmoving party in a motion for summary judgment to identify for the court specific facts which articulate and illustrate the presence of a genuine issue requiring trial. (Moore, Section 56.13[2] p. 56, 144-145)[11]

In the instant case, the issue is not even close. There was substantial evidence in the record from which to conclude there were triable issues of material fact, for all of the reasons asserted under Part I of the this Brief, set forth above.[12]

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[10]Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. (1986).

[11]"However, a nonmoving party's own affirmation or deposition can constitute affirmative evidence to defeat a motion for summary judgement, even if it only contains denials." (Moore, Section 56.13[2] p. 56 - 147-148) Plaintiff Henry filed a detailed declaration in the instant case describing the event (Apdx. B-6, n.1).

[12]Petitioners complain that the Court of Appeals relied upon the declarations of May and Burns submitted by plaintiff in support of an earlier unsuccessful motion for class certification

Indeed, there was substantially *more* evidence in the record in the instant case than would have been required to defeat defendants' summary judgment motion. As noted, the evidence of "custom" or "policy" and "deliberate indifference" covered three broad time frames: before the event, during the event, and after the event. The Court of Appeals, reviewing the issue de novo, found overwhelming evidence not only from which to infer, but from which to *conclude*, that defendants acted with deliberate indifference to Mr. Henry's constitutional rights.

Nevertheless, it must be kept in mind that actions brought under section 1983 generally pit a single plaintiff, as here, a private citizen, Mr. Henry, against a formidable array of governmental and political forces, such as, here, the Sheriff of the County with his power to arrest, detain, and jail, and his power to intimidate, and the County of Shasta itself. The facts of the instant case demonstrate the very nature of the problem: Mr. Henry was held overnight in a jail, naked, without his glasses, and therefore unable to read name badges, under the control of Sheriff's deputies and medical personnel, some of whom refused to give their names when he asked for them. Thus, Mr. Henry's complaint filed in the U.S. District

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(Petition for Writ of Certiorari at page 4). However, a court looks at the entire record on file in the case in determining whether there is a genuine issue of material fact (Federal Rules of Civil Procedure 56(c)). Moreover, this Court said in Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."

Court understandably named Doe defendants.

When it came time to hear the motion for summary judgment, Mr. Henry was placed at an even greater disadvantage because his counsel was not permitted oral argument to contest petitioners' summary judgment motion.[13] Nevertheless, the record speaks for itself. It was wrong to grant summary judgment for petitioner-defendants.

III. The Decision Of The Court Of Appeals Follows Established Law

The Court of Appeals did not hold that post-event evidence is sufficient to prove an official policy or custom in violation of 42 U.S.C. Section 1983 in the absence of other evidence that the municipal policymaker was aware of post-event incidents and did nothing to end them. Accordingly,

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[13]Petitioners allude to the fact that "sanctions were imposed" without saying what the sanctions were. (Petition For Writ Of Certiorari at page 3) A $50.00 sanction was imposed in 1994 for non-compliance with a local rule. A substantially more severe sanction was imposed at the hearing on the motion for summary judgment for a second violation of a local rule. The sanction was that Mr. Henry's trial counsel was not allowed to be heard orally, and to argue against, petitioners' motion for summary judgment. The Court of Appeals for the Ninth Circuit has stated, ". . . we admonish trial courts to grant oral argument on nonfrivolous summary judgment motions . . ." Houston v. Bryan, 725 F.2d 516, 518 (9th Cir. 1984) In refusing to grant oral argument to Mr. Henry, and thereafter ruling against him, the trial court may well have abused its discretion and invited scrutiny of its decision, and of the record as a whole, by the Court of Appeals.

the entire premise for petitioners' Petition For Writ Of Certiorari is wrong. It follows that each of their mini-reasons for granting certiorari is without foundation. Therefore, the discussion that follows is essentially unnecessary.

A. The Court of Appeals Decision Does Not Conflict With Other Circuits

Petitioners contend that the decision of the Court of Appeals is in "conflict" with holdings from other circuit Courts of Appeals which "reject" the "post-event doctrine." Petitioners cite cases from the Seventh Circuit, Eighth Circuit and Eleventh Circuit[14] to support this proposition (Petition for Writ of Certiorari at page 4-5). Petitioners further contend that three other circuit Courts of Appeals, including the First Circuit, Fifth Circuit, and the Ninth Circuit itself, "recognize" a "limited application of the post-event rule" (Petition For Writ Of Certiorari at p. 5).

Mr. Henry respectfully submits petitioners' conclusion is the product of a highly imaginative reading of the cases cited by them. The case from the Eleventh Circuit, Wright v. Sheppard, 919 F.2d 665, 674-675 (11th Cir. 1990), impliedly *embraced* the admissibility of post-event evidence, and cited another Eleventh Circuit case, Fundiller v. City of Cooper

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[14]Petitioners cite: Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996); Parrish v. Luckie, 963 F.2d 201, 204 (8th Cir. 1992); Jones v. City of Chicago, 787 F. 2d 200, 207 n. 8 (7th Cir. 1986); Wright v. Sheppard, 919 F.2d 665, 674-675 (11th Cir. 1990).

City, 777 F.2d 1436, 1443 (11th Cir. 1985), which *did* embrace the admissibility of such evidence. In Fundiller, the court reinstated the trial court's dismissal of a Section 1983 suit against the city's Public Safety Director on an allegation that he failed to take corrective steps although he was aware of police use of unlawful, excessive force. Evidence pointing to his alleged failure to take corrective steps would be post-event evidence and obviously the court was of the opinion such evidence was probative of plaintiff's Section 1983 claim against the Public Safety Director. In Wright, the court said plaintiff's allegations that the Sheriff in that case ratified the deputy's misconduct by failing to correct it, failed under the facts because the deputy resigned after the Sheriff investigated the alleged misconduct. 919 F.2d at 675. The court in Wright implied that had the deputy not resigned and had the Sheriff failed to correct the deputy's misconduct, such post-event evidence would be admissible on the Sheriff's culpability.

In the case from the Seventh Circuit, Jones v. City of Chicago, 787 F.2d 200, 207 n.8 (7th Cir. 1986), the court factually distinguished the "post-event evidence" tendered by the plaintiff in that case from the facts pertaining to plaintiff's claim. Plaintiff alleged a sexual assault by a city-employed physician during a pelvic exam. The post-event evidence consisted of complaints by other patients about "comments" the physician had made. The post-event complaints did not allege conduct of a sexual nature. The court in Jones did not rule out the admissibility of factually relevant post-event evidence, nor announce a rule rejecting such evidence out of

hand.

The two cases from the Eighth Circuit, Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996) and Parrish v. Luckie, 963 F.2d 201, 204 (8th Cir. 1992), did not involve post-event evidence as far as respondent is able to tell. Neither case referred to "post-event" evidence and neither case expressed a repudiation of the admissibility of such evidence.

Thus, petitioners' attempt to set up a "split" within the circuits fails because they fail to demonstrate that the circuits mentioned take a side in the supposed "split."

As to the other side of the "split" -- the supposed pro-"post-event" side -- only one of the cases cited by petitioners – Bordanaro v. McLeod, 871 F.2d 1154, 1166-1167 (1st Cir. 1989) -- uses the term "post-event evidence." Moreover, its use of the term, and its invocation of the rule, can hardly be said to be a "limited application." (Petition For Writ Of Certiorari at page 5) In Bordanaro, the Court of Appeals cites Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) as authority for the use of such evidence. The Court of Appeals then points out:

> "The [United States Supreme] Court has never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions. Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right."

871 F.2d at 1166-1167.

The Court of Appeals precedes this statement by a reference to this Court's decision in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). The Bordonaro court concludes that Praprotnik ". . . does not foreclose such use of post-event evidence." 871 F.2d at 1166.

The other two cases cited for the pro-"post-event" side of the "split" use post-event evidence but do not use the term "post-event evidence." Neither case expresses a doctrine or policy to limit the use of such evidence. Rather, the scope of its use does not appear to be an issue. See Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir. 1991); Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985). In Grandstaff the Court of Appeals used the term "subsequent conduct" and "conduct after the events of that night." 767 F.2d at 171. The Court of Appeals in Larez simply cited Grandstaff without applying a specific term. Larez cited a second case as well, McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986), a case which also simply cited to Grandstaff.

Grandstaff was apparently the first case in any circuit to enunciate the principle in the context of section 1983 litigation that deliberate indifference could be inferred from subsequent conduct. As noted above, Grandstaff did not use the term "post-event evidence," but instead referred to "subsequent conduct" and "conduct after the events of that night." 767 F.2d at 171. Grandstaff did not derive the rule in a vacuum. It relied on Wigmore and two decisions of this Court: "The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his

disposition prior to August 11. See 2 Wigmore, Evidence Sections 382, 437 (Chadbourn rev. 1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, see Anderson v. United States, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed. 2d 20 (1974), so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy." 767 F.2d at 171.

Thus, the so-called "split" in the circuits is a fiction. It does not exist and therefore affords no basis for granting certiorari.

B. The Court of Appeals Decision Applies The Element Of "Deliberate Indifference"

Petitioners contend that the Court of Appeals trampled on the requirement that plaintiff show deliberate indifference toward plaintiff's constitutional rights, an essential element of a claim under section 1983 for purposes of municipal liability. (Petition For Writ Of Certiorari at page 6-7) This conclusion simply isn't supported by a reading of the Court of Appeals' decision. The Court of Appeals refers to this element of proof in the first sentence of the first paragraph of its discussion of the law (Apdx. B - 17) and refers to it again and again throughout its opinion. The Court of Appeals demonstrates throughout its opinion a series of events occurring prior to the

event, during the event, and after the event, that show petitioners' deliberate indifference toward Mr. Henry's constitutional rights. Those events are summarized above in Part I of the instant Brief.

C. The Court Of Appeals Decision Will Not Preclude Summary Judgment Of Non-Meritorious Municipal Liability Allegations

Petitioners contend that the Court of Appeals decision will preclude summary judgment of non-meritorious municipal liability allegations.(Petition For Writ Of Certiorari at page 7-9) Once again the problem with the argument is that it proceeds from the faulty assumption that the Court of Appeals adopted a rule and imposed a doctrine that it did not adopt and did not impose. Moreover, as pointed out above, Mr. Henry's claim against petitioners is meritorious. Thus, it is difficult to conclude that an appellate court opinion which says that a particular plaintiff's claim has merit somehow makes it harder for municipalities to defend against claims that do not have merit.

Petitioners' observation that jails have safety cells for inmates who behave in bizarre, self-threatening or violent ways is beside the point because Mr. Henry's behavior was not bizarre, self-threatening or violent. Petitioners' argument that the decision of the Court of Appeals will allow other plaintiffs to successfully oppose summary judgment simply by alleging similar incidents after their law suits are filed also

lacks merit because the Court of Appeals' decision did not point solely to events which occurred after his law suit was filed. The decision pointed to evidence before the event, during the event, and after the event. Thus there is nothing "expansive" about the decision the Court of Appeals announced.

D. The Court Of Appeals Decision Was Consistent With Jill Brown

Petitioners contend that the Court of Appeals' decision deviates from the causal link requirement as stated by this Court in Bd. Of County Commissioners v. Jill Brown, 520 U.S. 397 (1997). It does not.[15] The Court of Appeals refers to this element of proof in the first sentence of the first paragraph of its discussion of the law. It says, "A municipal defendant may only be held liable under section 1983 if the unlawful actions of its employees or agents were taken *pursuant to that defendant's policies or customs*." (Apdx. B - 17) (emphasis added) The phrase "pursuant to" is simply

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[15]This Court decided Jill Brown on April 28, 1997 and rehearing was denied on June 16, 1997. Oral argument in the instant case before the Court of Appeals occurred on December 12, 1996. The Court of Appeals issued its decision on December 23, 1997. As far as respondent is able to determine, petitioners waited until after the Court of Appeals issued its decision to inform it of this Court's decision in Jill Brown or to argue its applicability to the instant case. Petitioners filed a Petition For Rehearing And Suggestion For Rehearing En Banc and for the first time brought the Jill Brown decision to the Court of Appeals' attention.

another way of saying "moving force." The Court of Appeals was obviously aware of the requirement that there be a causal link. The case which it cites for the proposition that employees or agents act "pursuant to" a municipal defendant's policies or customs is Monell v. Department of Soc. Servs., 436 U.S. 658 (1978), the case which imposes the causal link requirement. Moreover, the Court of Appeals cites specifically to page 694 of this Court's decision in Monell, the page where this Court uses the term "moving force."

As noted at the very outset of this Brief, in Jill Brown this Court did not set a new or higher standard of municipal liability under section 1983. It adhered directly, and repeatedly cited to, the principles established in Monell. It reaffirmed the very case -- Monell -- on which the Court of Appeals in the instant case based its decision. Therefore, the decision of the Court of Appeals was consistent not only with Monell but with Jill Brown.

Conclusion

The Petition For Writ Of Certiorari lacks merit and should be denied.

July 2, 1998

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